



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des Tribunaux cambodgiens

Royaume du Cambodge
Nation Religion Roi

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des co-juges d'instruction

Case File No: 004/07-09-2009-ECCC-OCIJ

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de réception): 18 / 03 / 2016
ម៉ោង (Time/Heure): 15:40
អ្នកទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SANN RADA

Before: **The Co-Investigating Judges**
Date: **18 March 2016**
Language(s): **English [Original]**
Classification: **CONFIDENTIAL**

**DECISION ON AO AN'S REQUEST TO ORDER DSS TO
PROVIDE ADDITIONAL RESOURCES**

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Defence Support Section Office of the Administration

I. PROCEDURAL HISTORY

1. On 27 March 2015, former International Co-Investigating Judge Harmon charged Ao An for violations of the 1956 Cambodian Penal Code and crimes against humanity allegedly committed in three different locations of the Central Zone of Democratic Kampuchea.¹ Judge Harmon also informed Ao An that he was charged for some of these crimes, *inter alia*, by virtue of his participation in a joint criminal enterprise (“Initial Appearance”).²
2. On 14 March 2016, I notified Ao An that there was clear and consistent evidence that he may be responsible for crimes committed in ten additional locations of the Central Zone. The new charges included genocide, which had not been previously charged, and a joint criminal enterprise broader in scope than the one previously charged (“Additional Charges”).³ In accordance with the ECCC Completion Plan published on 31 December 2015, the investigation against Ao An is due to close by June 2016.
3. On 15 March 2016, the Ao An Defence filed an Urgent Request for Additional Resources in which they informed the Co-Investigating Judges (“CIJs”) that upon notification of the Additional Charges and of the intention to close the investigation in June 2016, they requested the Defence Support Section (“DSS”) further resources to address the additional workload (“Request for Resources”).⁴ According to the Defence, the Chief of DSS denied the request because there were no funds left in the Defence’s budget for 2016, but stated that he could seek additional resources if directed to do so by the International Co-Investigating Judge.⁵
4. The Defence submit that, in order to have sufficient time and facilities to prepare Ao An’s defence, they need additional staff to identify investigative requests or applications for annulment of investigative action which may be necessary as consequence of the Additional Charges.⁶
5. Accordingly, the Defence request the CIJs to order DSS to increase the Defence’s funding thus to allow the recruitment of one level four senior international legal consultant and one level two junior international legal consultant, and to order the Office of the Administration to provide all the necessary support to facilitate their recruitment.⁷

II. DISCUSSION

A. The CIJs’ authority to review DSS’ decisions

6. Article 23 (new) of the ECCC Law gives the CIJs responsibility over judicial investigations. This responsibility includes guaranteeing the fairness of the proceedings.⁸ While this responsibility is incumbent on the CIJs, the Internal Rules do not explicitly provide them with the authority to review DSS’ decisions

¹ Case File No. 004-D242, *Written Record of Initial Appearance*, 27 March 2015, p. 6.

² *Ibid.*, p. 7.

³ Case File No. 004-D303, *Written Record of Further Appearance*, 14 March 2016, pp. 8-9.

⁴ Case File No. 004-D304, *Urgent Request for Additional Resources*, 15 March 2016, paras 3, 13.

⁵ *Ibid.*, para. 14.

⁶ *Ibid.*, para. 15.

⁷ *Ibid.*, para. 18.

⁸ See Internal Rule 21(1)(a).

on requests for resources submitted by charged persons during a judicial investigation. Pursuant to Article 23 new of the ECCC Law, I therefore find it appropriate to seek guidance in relevant procedures established at the international level.

7. It is well established at the international level that judicial bodies have an inherent power to determine incidental issues that arise as a direct consequence of the exercise of their primary jurisdiction.⁹ These inherent powers include the authority to review administrative decisions which may prejudice the fair trial rights of persons charged with a criminal offence.¹⁰ However, such unilateral judicial action vis-à-vis the budget-holder administration should only be taken as a last resort. I have consulted with the Deputy-Director of UNAKRT and have been assured that, should I determine that the Defence's request is founded, efforts will be made to arrive at an adequate solution.

B. The Defence's request for additional resources

8. The right to adequate time and facilities to prepare for one's defence, enshrined in Article 14(3)(b) of the 1966 International Covenant on Civil and Political Rights, is a fundamental element of the guarantee of a fair trial and a corollary of the principle of equality of arms.¹¹ What amounts to "adequate time" depends on the circumstances of each case.¹²
9. In the circumstances of the case at hand, I consider it relevant that Ao An was notified of a substantial number of additional charges on 14 March 2016; that the scope of the joint criminal enterprise of which he is alleged to be a member according to the Additional Charges is broader than the one notified to him during his Initial Appearance; and that the investigation against Ao An is scheduled to be concluded in June 2016 according to the ECCC Completion Plan published on 31 December 2015. I also note the Defence's submission that, to be able to make investigative and other types of requests in relation to the Additional Charges by that date, they need two additional international legal consultants.
10. While I am in principle sympathetic to and broadly supportive of the request, the justification for the additional staff is at present not sufficiently substantiated. I note that Ao An has three co-counsel, which is the exception in the ECCC defence teams. It is also unclear why the two new team members are needed, one of whom is to be a senior adviser. I will require further and better particulars on this before I can decide.
11. This decision is filed in English, with a Khmer translation to follow.

⁹ Case File No. 002-D14/1/2, *Order Suspending the Enforcement of the "Order on International Co-Prosecutors Public Statement Regarding Case File 003"*, 13 June 2011, para. 4; ICTY, *Prosecutor v. Međaković et al.*, Case No. IT-02-65-AR73.1, *Decision on appeal by the Prosecution to Resolve Conflict of Interest regarding Attorney Goran Simić*, 6 October 2004, para. 7.

¹⁰ *See Prosecutor v. Šešelj*, Case No. IT-03-67-R33B, *Public Redacted Version of the Decision on the Registry Submissions pursuant to Rule 33(B) regarding the Trial chamber's Decision on Financing of Defence Rendered on 8 April 2011*, 17 May 2011, paras 19-20; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, *Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates*, 28 January 2009, para. 12.

¹¹ *See* Human Rights Committee, Communication No. 282/1988, *Smith v. Jamaica*, para. 10.4.

¹² *See* Human Rights Committee, Communication No. 349/1989, *Wright v. Jamaica*, para. 8.4;

FOR THE FOREGOING REASONS, I:

- 12. **ORDER** the Defence to provide further and better particulars on the justification for the two requested posts within one week from notification of this decision;
- 13. **INSTRUCT** the Defence to include DSS and the Office of the Administration among the recipients of the filing;
- 14. **REQUEST** DSS and the Office of the Administration to file any response they may have to the Defence’s further submissions within one week from their notification; and
- 15. **REMAIN** seized of the matter.

Dated 18 March 2016, Phnom Penh



Judge Michael Bohlander

សហចៅក្រមនៃបណ្តុំតុលាការជាតិ

**International Co-Investigating Judge
Co-juge d’instruction international**